In the

Supreme Court of the United States

OCTOBER TERM A. D. 1971

No. 71-685

ROBERT J. LEHNHAUSEN,

Petitioner,

vs.

LAKE SHORE AUTO PARTS, et al.,

Respondents.

No. 71-691

EDWARD J. BARRETT,
County Clerk of Cook County, Illinois, et al.,

Petitioners,

vs.

CLEMENS K. SHAPIRO, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Illinois

MOTION FOR LEAVE TO FILE A BRIEF AND ORALLY ARGUE AS AMICI CURIAE & BRIEF OF AMICI CURIAE

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Proviso Township High School District # 209, Cicero Grade School District # 99, Bellwood Grade School District # 88, and River Grove Grade School District #85½, by their attorneys, Ancel, Glink, Diamond & Murphy and Witwer, Moran & Burlage, move for leave to file a

Brief and Orally Argue as Amici Curiae in the above-entitled cases, the consent of the attorneys for the petitioners and respondents not having been obtained, and in support thereof state as follows:

1. In a substantial sense, these applicants were the prevailing parties in the proceedings in the Illinois Supreme Court (there described, in Docket No. 44308, as the *Maynard* petitioners). Eugene L. Maynard is not an applicant for amicus standing since the class of individual taxpayers is represented by other parties to this litigation.

2. These applicants are all school districts within Cook County, Illinois, which receive substantial revenue from the proceeds of the Illinois personal property tax.

3. These parties first became interested in the cases at bar when on March 30, 1970, the respondent Lake Shore Auto Parts Co., procured a judgment from Judge Walter P. Dahl of the Circuit Court of Cook County which had the effect of abolishing all Illinois personal property taxes. That decision found that the newly adopted Article IX-A of the Illinois Constitution which abolished personal property tax for "individuals" had amended a provision of the Illinois revenue statutes. The trial court held that the revenue statute once amended was unconstitutional since it imposed a property tax on corporations and excluded individuals. The trial court thus held Article IX-A to be constitutional, the Revenue Act provision unconstitutional, and all personal property taxation to be ended.

Had that trial court decision been upheld, it would have resulted in an immediate loss in yearly tax revenue of $1,752,231.00 for applicant Proviso, $1,203,169.00 for ap-

plicant Cicero, and lesser but substantial amounts by Bellwood and River Grove, all as part of a statewide loss in yearly revenue for school districts, municipalities, counties, and other public bodies of over $250,000,000.00.

4. These applicants were unable to negotiate employment contracts, make purchases of needed supplies, construct buildings or prepare budgets and financial projections in the uncertain situation caused by the trial court decision in *Lake Shore*. In addition, the applicants believed that the judgment order entered by Judge Dahl was erroneous. Therefore, these applicants along with an individual taxpayer, Eugene L. Maynard, requested leave to file an original action in the Illinois Supreme Court. The petition in the Illinois Supreme Court alleged, among other things, that the parties in the *Lake Shore* case would not present all necessary arguments to the Court. While Lake Shore Auto Parts argued that a portion of the Revenue Act (Ill. Rev. Stat. 1969, Ch. 120, Secs. 482, et seq.) was unconstitutional, these applicants sought to enter the case to argue the unconstitutionality of Article IX-A itself. The Illinois Supreme Court (which already had the *Lake Shore* case before it on appeal) allowed these applicants leave to file their action under the Court's powers to grant original jurisdiction. That original action and the *Lake Shore* case were consolidated.

5. After these applicants were granted leave to file their original action in the Illinois Supreme Court, a case was hurriedly brought, in the same Circuit Court of Cook County (but before another judge thereof), by a group of parties, all but one of whom had previously been refused the right to file such an original action. Those parties were Clemens K. Shapiro, a natural person; Jerome Herman, doing business as "The Spot", representing in-

dividuals engaged in business; Guy S. Ross and Eugene D. Ross, doing business as "Guy S. Ross & Co.", representing individuals engaged in business as partners; and W. Weil & Sons, Inc., representing corporations. After a highly expedited trial and appeal, their case was consolidated with the other two cases, and all three cases were argued together with a single opinion being written.

6. Among all of the parties before the Illinois Supreme Court, these applicants were the only parties to seriously argue that Article IX-A was unconstitutional on equal protection grounds. Such was the exact judgment reached by the Illinois Supreme Court. After having made the declaration of unconstitutionality of Article IX-A, in accordance with the prayer of the *Maynard* petitioners, the court proceeded to not only dismiss the *Maynard* original petition but also mandated dismissal of the *Lake Shore* and *Shapiro* cases by the lower courts. From that judgment these applicants, having prevailed, did not appeal. Since the state and county officials who were defendants in the Illinois Supreme Court chose the *Lake Shore* and *Shapiro* cases—rather than the *Maynard* case—as their vehicles for seeking certiorari jurisdiction, questions arose whether applicants were clearly entitled to the status of "respondents" in this Court. Anxious to protect our victory and desirous of clarifying the point, we, on May 5, 1972, filed a motion requesting recognition as parties to the certiorari proceeding. This Court denied that motion without prejudice to our rights to request amici standing.

7. An analysis of the position of the parties now before this Court and an examination of the briefs already filed will quickly show that these applicants, as amici curiae, will be the only parties effectively urging affirmance of the Illinois Supreme Court decision.

(a) The Illinois Attorney General and the State's Attorney of Cook County, representing state and county tax officials, are both in this case since it is their responsibility to attempt to uphold the validity of Article IX-A. Generally, such officials would be representing the applicant public bodies who are in danger of losing established tax revenues. In this case, however, the argument of such public bodies will only be before the Court by way of this amici brief, which will show the illegal and adverse practical effects of reversing the Illinois Supreme Court decision.

(b) Lake Shore Auto Parts Co. is the respondent in case No. 71-685. Lake Shore is a small auto parts company which sought in this case to represent all corporations. In the trial court, Lake Shore succeeded, by an unusual argument, in procuring an order which would have abolished all personal property taxes on corporations and everyone else as well. The Illinois Supreme Court rejected that argument and overruled Lake Shore's trial court victory. Lake Shore attempted to review that decision in this Court but its petition for writ of certiorari was denied. At that point, the interest of Lake Shore waned. Lake Shore, by its attorney, then asked to withdraw from this litigation. Such request was denied. We are informed that Lake Shore will file a brief in this case. Such brief, in spite of the denial of certiorari, will argue points rejected by both the Illinois Supreme Court in its opinion and this Court in its denial of certiorari to Lake Shore. Lake Shore, though nominally a respondent, will ask that the Illinois Supreme Court be reversed. It is therefore obvious that said respondent may not be viewed as an advocate for the affirmance of the Illinois Supreme Court decision.

(c) Clemens K. Shapiro, Jerome Herman, Guy S. Ross and Eugene D. Ross are among the respondents in Case No. 71-691. The briefs of these parties have

already been submitted to the Court. While each of these parties is designated a "respondent" and might be expected to support the position taken by the Illinois Supreme Court, their briefs take an opposite position. Each of these respondents requests that the judgment of the Illinois Supreme Court be reversed. The interest of these parties is that of natural persons who own personal property either for their own enjoyment or for business usage. Such parties can only oppose the position taken by the Illinois Supreme Court. It is obvious both from their position and their briefs that the Court will receive from them no argument adverse to that of the Attorney General or State's Attorney.

(d) The only other "party" in the case is M. Weil & Sons, Inc. The brief of M. Weil & Sons, Inc. contains a statement that they will adequately and competently represent "every corporation in the State of Illinois" (Respondent's Brief—page 2). An examination of the Weil brief, however, indicates otherwise. The first argument heading put forward by the corporation is to "adopt and respectfully submit" the opinion of the Supreme Court of Illinois. No discussion of that opinion is given. The second argument heading is a discussion comprising three pages without pertinent citation of the central issue in this litigation. The third argument heading in the brief (set out over 3½ pages) is that Article IX-A of the 1870 Constitution is too vague to stand as a provision of basic Illinois law. With all due respect to M. Weil & Sons, Inc., the contents of its brief hardly represents an adequate defense of itself let alone the opinion of the Illinois Supreme Court.

(e) In view of the foregoing, we believe that it is fair to characterize the *Shapiro* case as a "friendly" suit with all parties thereto being "friendly" participants not true adversaries.

8. The only parties with any interest in the affirmance of the Illinois Supreme Court decision are these applicants who seek amici status and who were substantially the prevailing parties therein. That these applicants have no quarrel with a properly drafted statutory or constitutional exemption of personal property taxation is shown in our brief which discusses a very recent Illinois legislative development to that effect. On behalf of the citizens of our districts, however, we believe that we do have a responsibility to resist the unconstitutional removal of a large portion of the tax base of public bodies within the State of Illinois by what we and the Illinois Supreme Court view to be unconstitutional means.

9. If these applicants are granted amici status, they will argue in their brief and in their oral presentation that the issues which this case raises involve all public bodies throughout the United States and the continued validity of equal protection guarantees for all corporations throughout the country. These issues are of enormous importance and ought not to be presented before this Court in anything less than a full adversary presentation.

10. For the reasons set out in this motion, regarding the non-adversary status of the parties now before the Court and the lack of any party to argue for the affirmance of the Illinois Supreme Court decision, these applicants ask that in addition to the privilege of filing a brief that they be allowed to orally argue. We respectfully urge that the presence during oral argument of counsel for these amici among whom are the President of the 1970 Illinois Constitutional Convention and lawyers who are

knowledgeable in Illinois municipal and school law, will be in aid of the Court.

Respectfully submitted,

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BRIEF OF AMICI CURIAE

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INTRODUCTION

Proviso Township High School District # 209, Cicero Grade School District # 99, Bellwood Grade School District # 88, and River Grove Grade School District # 85½ are all public bodies within the State of Illinois assigned the task of the education of the school children within their districts. These parties have been involved in the issues at bar since May 12, 1971, when the Illinois Supreme Court granted their motion for leave to file a

complaint in that court as an original action arguing, among other things, the constitutional invalidity of Article IX-A of the Illinois Constitution. It has been the position of these parties since that time that Article IX-A, added by amendment to the Illinois Constitution of 1870 (at the General Election of November 3, 1970), violated the equal protection clause of the 14th Amendment of the United States Constitution in that it attempted to require the paying of personal property taxes by corporations while freeing all other taxpayers from that burden.

These amici appeared in the Illinois Supreme Court in a representative capacity on behalf of all public bodies within the State which receive the proceeds of the Illinois personal property tax. Each of the school districts appearing here as amici receive substantial revenues from personal property taxes—amounting in the case of two amici to over one million dollars per year. In the Illinois Supreme Court these amici argued in the alternative. We first argued that if the exemption of personal property taxes "as to individuals" could be interpreted to exempt only the non-business property of natural persons, then such a classification would be valid under the 14th Amendment. Such a distinction would not be based upon the ownership of the property but upon its use. The Illinois Supreme Court rejected that argument stating that the clear meaning of the language of Article IX-A was to exempt from the tax all persons but corporate persons. Our alternative argument in the Illinois Supreme Court was that if such an interpretation was compelled, then the Court had no choice but to find Article IX-A an unconstitutional discrimination against corporations on equal protection grounds. As has been pointed out in our motion for leave to file this brief, these amici were *the only parties* to aggressively make that contention in the Illi-

nois Supreme Court. The Court accepted that argument. In our motion for leave to file this brief (under this same cover), we explain the rather unusual circumstances which have resulted in our appearing in this cause as amici rather than as respondents. These parties, in their representative capacity, on behalf of all public bodies in the State, felt compelled to bring this original action and to follow the litigation on behalf of their class in order to resist the withdrawal of all personal property tax revenue, as was the trial court finding in *Lake Shore,* or substantial portions of personal property tax revenue, as was the trial court finding in *Shapiro.* These amici and the class they represent are not opposed to tax reform but are opposed to such reform when brought about by constitutional amendments which violate the equal protection clause and trial court decisions which erroneously interpret long-standing case law. Having been granted the status of amici by this Court, we shall, therefore, proceed to argue that the decision, procured through our labors, in the Illinois Supreme Court should be affirmed.

OPINION BELOW

The opinion and dissent thereto of the Supreme Court of the State of Illinois are reported in 49 Ill. 2d 137 and 273 N.E. 2d 592.

JURISDICTION

The jurisdiction of this Court is invoked to review a final judgment of the Supreme Court of Illinois pursuant to Title 28 U.S.C. § 1257 (3). The decision of the court below was rendered on July 9, 1971. A petition for rehearing was denied on August 24, 1971. The petitions for writ of certiorari were granted April 3, 1972.

CONSTITUTIONAL PROVISION

Article IX-A of the Constitution of the State of Illinois of 1870, as amended, and approved, provides:

> "Section 1. Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited as to individuals."

QUESTION PRESENTED

Whether a State Constitutional provision which distinguishes between corporations and natural persons for purposes of imposing an ad valorem tax on personal property, *a distinction based solely on ownership by one as a corporate person and the other as a natural person*, violates the equal protection clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

The Illinois Constitution of 1870, Article IX, §1, required the Illinois General Assembly to levy ad valorem taxes so that "every person and corporation shall pay a tax *in proportion to the value* of his, her or its property." (Emphasis added.) This mandate had been implemented by a comprehensive Revenue Act which applied to all property and to all taxpayers, with typical statutory exemptions, e.g. charitable, religious. Revenue Act of 1939, §1 et seq., Ill. Rev. Stat. ch. 120, §482 et seq.

The Illinois General Assembly, by Senate Joint Resolution 30, adopted June 30, 1969, submitted a proposition for referendum vote at the November, 1970 general election, to adopt Article IX-A of the 1870 Constitution. If adopted, Article IX-A purported to abolish the ad valorem personal property tax, but only on property owned by individuals. It received an overwhelming majority vote.

Various parties, including amici curiae, utilizing different Illinois courts and presenting a variety of arguments, presented the Fourteenth Amendment question, stated *supra*, in the Illinois Supreme Court. That Court declared Article IX-A as construed by it to be unconstitutional under the equal protection clause of the Fourteenth Amendment. *Lake Shore Auto Parts Co.* v. *Korzen*, 49 Ill. 2d 137, 273 N.E. 2d 592 (1971).

Several parties thereafter petitioned herein for writ of certiorari seeking review of that decision. This Court on April 3, 1972, granted two of those petitions and consolidated the cases. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, No. 71-685; *Barrett* v. *Shapiro*, No. 71-691.

SUMMARY OF ARGUMENT

1. The issue is very narrowly limited both by concession of the parties and by the decision of the Illinois Supreme Court. That decision is viewed by this Court as binding here in determining the construction of Article IX-A of the 1870 Illinois Constitution, being an authoritative determination by the highest court of the State of Illinois.

2. That authoritative construction discloses that: (a) Article IX-A classifies personal property for ad valorem taxation without regard to the characteristics or use of the property, but solely on ownership; (b) the proposed classification promotes no policy other than a desire to free one set of property owners, *i.e.* natural persons, from the burden of a tax imposed upon another set, *i.e.*, corporations; and (c) under Illinois law, ownership for purposes of ad valorem property taxation is a neutral consideration.

3. Accordingly, such an arbitrary classification as Article IX-A purported to establish violated the equal protection clause of the Fourteenth Amendment, as interpreted for almost a century in a long line of federal and state court decisions. Petitioners' efforts to distinguish these cases totally fail, since the cases they rely on as 'superseding' or 'undermining' this long-established doctrine did not involve ad valorem property taxes *in situations where the only ground of discriminatory classifications against corporations was ownership per se.*

4. Since the Illinois personal property tax, as affected by Article IX-A, cannot conceivably be viewed as an excise, income, occupation or franchise tax, or as a special property classification based on use, there can be no reversal of the Illinois Supreme Court, absent a showing of a valid public policy justifying or advanced by this discrimination against corporations. Petitioners wholly fail to present any valid policy.

5. The legislative history of Article IX-A and of the 1970 Illinois Constitution, including the deliberations of the Sixth Illinois Constitutional Convention, neither afford any public policy justification for the discrimination, nor cure the unconstitutional defect implicit in Article IX-A.

6. Adoption of the arguments of plaintiff below in the *Lake Shore Auto Parts Co.* case would violate basic principles of constitutional interpretation and would cause financial chaos for many public bodies.

7. Failure to sustain the decision of the Illinois Supreme Court would constitute a rejection of a time-honored interpretation of the equal protection clause. It in effect would end equal protection of the laws as to corporate persons. The consequences of such a decision would have incalculable, adverse legal, social and economic impact.

ARGUMENT

I.

DISCRIMINATION BETWEEN CORPORATIONS AND NATURAL PERSONS IN AD VALOREM PERSONAL PROPERTY TAXATION, BASED SOLELY ON OWNERSHIP IDENTIFICATION, CONSTITUTES A PATENT VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In parts I and II of our amici brief we deal principally with the arguments and contentions of the Illinois Attorney General contained in his Brief of Petitioner on Writ of Certiorari granted in Docket No. 71-685. References in these sections are to that brief and accompanying appendix.

Unlike the several issues stressed in his petition for a writ of certiorari, the Illinois Attorney General now properly narrows the issue of this case. He states in his brief (p. 2) that the Question Presented For Review is as follows:

> "Whether a State Constitutional provision which distinguishes between corporations and natural persons for the purposes of imposing an ad valorem tax on personal property violates the equal protection clause of the fourteenth amendment?".

With but one qualification we accept that statement. We would rephrase the question at issue as follows:

> "Whether a State Constitutional provision which distinguishes between corporations and natural persons for purposes of imposing an ad valorem tax on personal property, *a distinction based solely on ownership by one as a corporate person and the other as a*

natural person, violates the equal protection clause of the fourteenth amendment."

In this narrow frame of reference it becomes important at the outset to review the findings and conclusions of the Illinois Supreme Court in its opinion in *Lake Shore Auto Parts Co.* v. *Korzen,* 49 Ill. 2nd 137, 273 N.E. 2nd 592 (1971), supporting its construction of Article IX-A of the Illinois Constitution of 1870. The Illinois Attorney General correctly concedes that that court's "interpretation of the meaning of Article IX-A is controlling for the purpose of determining the issue raised here." See Brief, p. 9. It is equally clear that the construction by the Illinois Supreme Court which is binding here embraces not only the meaning of the particular words of Article IX-A but also the Illinois Supreme Court's consideration of legislative history, relevant contemporaneous events, questions of state policy and other interpretative factors reflected in its opinion. In a long line of cases based on principles of federalism, this court has held that it will be bound by authoritative construction by the highest state court of a state constitutional or statuory provision. See *Fairfield* v. *County of Gallatin,* 100 U.S. 47, 50-52 (1879); *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 285 (1961); *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 99 (1952); *Winters* v. *New York,* 333 U.S. 507, 514 (1948); *Highland Farms Dairy, Inc.* v. *Agnew,* 300 U.S. 608, 613 (1937); *Hebert* v. *Louisiana,* 272 U.S. 312, 316-317 (1926); *First National Bank of Garnett* v. *Ayers,* 160 U.S. 660, 664-665 (1896); *Polk's Estate* v. *Wendall,* 13 U.S. 87, 98 (1815) (Marshall, C.J.).

Salient parts of the opinion of the Illinois Supreme Court written by Mr. Justice Walter V. Schaefer which

conclusively support our definition of the issue are as follows:

(a) "We have examined the other materials* to which the Maynard and Shapiro plaintiffs have referred, but have found nothing which persuades us that the words of article IX-A should be given anything other than their natural meaning". (App. p. 28)

(b) "We conclude that the meaning of article IX-A is that *ad valorem* taxation of personal property owned by a natural person or by two or more natural persons as joint tenants or tenants in common is prohibited". (App. p. 28)

(c) "The new article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon the use to which it is put, but solely upon the ownership of the property. If the property is owned by A, it is taxable; if it is owned by B, it cannot be taxed". (App. p. 29)

(d) "It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the personal property tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others". (App. pp. 31-32)

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* The reference here is to comprehensive materials and arguments involving legislative history, administrative interpretations, contemporaneous developments and other interpretative factors which these amici, as Maynard plaintiffs below, alternately argued and which Shapiro plaintiffs also presented to show that the words "as to individuals" should be construed so as to establish classifications based on the nature and use of personal property.

(e) "For the purpose of a tax by valuation upon the ownership of real or personal property, the identity of the owner is a neutral consideration, as is his status as sole proprietor, joint tenant, tenant in common, partner (Ill. Rev. Stat. 1969, ch. 106½, par. 25), limited partnership (Ill. Rev. Stat. 1969, ch. 106½, par. 61), member of a professional service corporation (Ill. Rev. Stat. 1969, ch. 32, par. 415-1 et seq.), or of a professional association (Ill. Rev. Stat. 1969, ch. 106½, par. 101 et seq.; see Sup. Ct. Rule 721, Ill. Rev. Stat. 1969, ch. 110A, § 721; 43 Ill. 2d R. 721)." (App. p. 32)

The foregoing determinations are definitive and final in the review of this case. Petitioners do not argue, nor could they reasonably argue that this Court should now reverse its long established rule giving conclusive effect to construction of a state's constitution and statutes by its highest court. Thus review of the decision in *Lake Shore Auto Parts Co.* v. *Korzen,* 49 Ill.2d 137, 273 N.E. 2d 592 (1971) should proceed on the accepted premises (a) that the Illinois tax is sought to be imposed on corporate persons solely by reason of the fact that they are corporate persons and that natural persons are sought to be exempted solely because they are natural persons; (b) that the classification does not depend on any characteristics of property sought to be taxed or upon the use to which the property is put; also (c) that no reasonable and substantial state policy exists which was sought to be served by the discriminatory method of taxation provided in Article IX-A.

The Illinois Supreme Court adopting these premises as controlling held that the resultant discrimination against corporate entities violated the equal protection clause of the Fourteenth Amendment. In light of the settled legal principles hereinafter set forth governing the interaction

of a state's power to tax and the limitations imposed thereon by the Fourteenth Amendment, the decision of the Illinois court is clearly correct and must be affirmed.

Though the decisions of this Court have indicated that the goals of the Fourteenth Amendment are "substantial equality and fair equivalence" in the imposition of tax burdens, *Concordia Fire Ins. Co.* v. *Illinois*, 292 U.S. 535, 547 (1934); 16 C.J.S. Constitutional Law §520, the states have never been bound by hard and fast rules. Precise equality in all situations is not required and states may, under proper circumstances, classify persons, property and occupations, subjecting different classes to dissimilar tax treatment.

Despite this broad latitude, the equal protection clause serves to insulate corporations as well as natural persons from arbitrary and unreasonable tax treatment by the states. *Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920); *Pembina Consolidated Mining and Milling Co.* v. *Pennsylvania*, 125 U.S. 181 (1888). The parameters of the amendment's restraint on the states' ability to classify for taxing purposes have been restated by this Court on numerous occasions. Thus in *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522 (1959), this Court said pp. 526, 527:

> "Of course, the States, in exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition,

use or value. *Bell's Gap. R. Co.* v. *Pennsylvania*, 134 U.S. 232, 237; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283, 293; • • • *State Board of Tax Comm'rs of Indiana* v. *Jackson*, 283 U.S. 527, 537. 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure.' *Ohio Oil Co.* v. *Conway*, supra, 281 U.S., at 159.

"But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of legislation.' Royster Guano Co. v. *Virginia*, 253 U.S. 415; *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 37; *Air-Way Electric Appliance Corp.* v. *Day*, 266 U.S. 71, 85; *Schlesinger* v. *Wisconsin*, 270 U.S. 230, 240; *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, 160 • • •." (Emphasis supplied)

One of the most comprehensive summations of the pertinent equal protection considerations, emphasizing the necessity of rationality and fairness in classification, is that of Mr. Justice Brandeis, dissenting in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389, 406 (1928):

In passing upon legislation assailed under the equality clause we have declared that the *classification must rest upon a difference which is real*, as distinguished from one which is seeming, specious or fanciful, so that all actually situated similarly will be treated alike; *that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of*

> *the State; and that the difference must bear a relation to the object of the legislation which is substantial,* as distinguished from one which is speculative, remote or negligible. (Emphasis supplied.)

We believe that this court in reviewing the decision of Mr. Justice Walter V. Schaefer of the Illinois Supreme Court will agree that the classification attempted in Article IX-A does not rest 'upon a difference which is real' nor is it supported by a policy which is within the permissible functions of the State. On the contrary we believe this Court will find the arguments put forward to support the discrimination against corporate persons to be 'specious' and 'fanciful'.

In our considered judgment reversal of the decision of the Illinois Supreme Court herein as sought by petitioner would directly necessitate abandonment by this Court of a doctrine which has been settled for nearly ninety years and consistently relied on by lower Federal courts, state courts, state legislative and other governmental units. We refer to the long established doctrine that an ad valorem property tax may not be imposed by a state which discriminates against property owners solely by reason of the fact that they are corporations. Such a classification is *per se* unreasonable and constitutes a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

A leading writer states this rule in the following language:

> "Classification for exemption purposes may be based on the use to which property is devoted, as well as the nature of the property; but property cannot be exempted merely because of its ownership where the same kind of property owned by others is taxed . . .

> Instead of classifying property for the purpose of exemption either by its characteristics or by its uses, the legislature cannot classify the owners of property according to some characteristic possessed by them, or connected with their conduct, and thereupon base an exemption of the property of such persons, regardless of the characteristics possessed by it and of the uses to which it is put." 1 Cooley on Taxation (4th ed.) Para. 280, p. 594.

Corporations, due in large measure to the "artificial nature" of their existence at the sufferance of the states, have been forced, in some instances, to bear a greater proportion of the tax burden than individuals. *White River Lumber Co.* v. *Arkansas,* 279 U.S. 692 (1929); *Flint* v. *Stone Tracy Co.,* 220 U.S. 107 (1910); *Home Ins. Co.* v. *New York State,* 134 U.S. 594 (1890). However, classifications where the only perceivable distinction has been corporate as opposed to individual ownership of property have been consistently struck down.

In the landmark California Railroad Tax cases, *San Mateo Cty.* v. *Southern Pac. R. Co.,* 13 F. 722, *app. dismissed per stip.,* 116 U.S. 138 (1885); *Santa Clara Cty* v. *Southern Pac. R. Co.,* 18 F. 385, *aff'd on other grounds,* 118 U.S. 394 (1886), the California Constitution directed that for tax purposes the assessed value of all real estate be reduced by the amount of outstanding mortgages—except for property held by railroads and other quasi-public corporations. Finding the discriminatory treatment of the railroads violative of the Fourteenth Amendment, Justice Field held that the California law was invalid because it did not provide for ". . . a different rate of taxation for different kinds of property, *but for unequal taxation according to the character of the owner.*" [Emphasis supplied.] 13 F. 722, 738.

The tax invalidated in the California Railroad Tax cases was not a franchise or privilege tax upon the continued existence of the railroad corporations. *Id.* at p. 754. Justice Field noted, *id.*, that while a State may exclude corporations altogether, it may not require corporations to forego federal constitutional rights as a condition of continuing business. It is upon these cases that the *Quaker City* doctrine has been built.

In *McHenry* v. *Alford*, 168 U.S. 651 at 666 (1898), this court reviewed a case concerning the exemption from taxation of certain lands held by railroads, and stated:

> ". . . we agree that property of the same kind and under the same condition and used for the same purpose cannot be divided into different classes for purposes of taxation and taxed by a different rule simply because it belongs to different owners . . . ."

In 1928 the landmark case of *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 was decided by a divided court, the majority holding unconstitutional on equal protection grounds a Pennsylvania statute which taxed incorporated taxicab companies on their gross receipts while wholly exempting the gross receipts of unincorporated taxicab businesses. The court said (p. 402):

> "Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations, as are taxes on their capital stock or franchises . . . . The character of the owner is the sole fact on which the distinction and discrimination are made to depend. *The tax is imposed merely because the owner is a corporation.* . . . It follows that the section fails to meet the requirement that a classification, to be consistent with the equal protection clause, must be based on a real and substantial difference having a reasonable relation to the subject of the legislation." (Emphasis added).

The sharp issue drawn by the three dissenting Justices in the *Quaker City Cab* case is explained by their difference with the majority concerning the nature of the tax sought to be imposed by Pennsylvania on business receipts. They viewed the tax not so much as one on property but rather as an excise or privilege tax. Obviously in such a posture 'privilege' not 'ownership' would be the key to permissible classification and the distinction between natural persons and corporations. It is indeed doubtful that there would have been any dissent in that case had the tax been a clear-cut ad valorem property tax as in the instant case. By inherent definition the characteristics of ownership are totally irrelevant in the case of ad valorem property taxes. In the language of Mr. Justice Brandeis' dissent, 'ownership' can not provide a rational or 'real' basis of classification.

Similarly Mr. Justice Stone cast light on the meaning of his dissent when a year following the *Quaker City Cab* case he spoke for the majority of the Supreme Court in *Bromley* v. *McCaughn*, 280 U.S. 124, 137 (1929) pointing out that an excise or privilege tax may be imposed "upon the exercise of one of the numerous rights of property but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner regardless of the use or disposition made of his property". (Emphasis supplied) [1]

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[1] Although the Equal Protection Clause of the Fourteenth Amendment was not involved in this case, the statement of Mr. Justice Stone is of significance since this court has repeatedly held that the criteria for reasonable classification of an excise tax under the Fourteenth Amendment are comparable to the criteria under Article I, Section 8, Clause 1 of the United States Constitution, involved in *Bromley* v. *McCaughn*.

The *Quaker City Cab* case has been followed in both State and Federal courts which have accepted the continuing vitality of the principles there stated.[2]

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[2] The Quaker City Cab Company rule has been cited, often with detailed excerpts, in over 100 state and lower Federal court decisions as well as in at least 19 subsequent U. S. Supreme Court decisions. Among those cases the following are either directly or tangentially relevant and are therefore cited:

1. *Federal Appellate*
   (a) *Mayor & City of Baltimore* v. *Williams*, 61 F. 2d 374, 378-379 (C.C.A. 4, 1932) (denial to exempt single railroad from property taxation);
   (b) *Franklin* v. *Carter*, 51 F. 2d 345, 347 (10th Cir., 1931) (no denial to tax dividend income to individuals only);
   (c) *Southern Boulevard R. Co.* v. *City of New York*, 86 F. 2d 633, 635 (2nd Cir., 1936);
   (d) *Antilles Surveys, Inc.* v. *De Jongh*, 358 F. 2d 787 (3rd Cir., 1966) (no denial to impose gross receipts tax exempting receipts attributable solely to taxpayer's personal services).
2. *Federal District*
   (a) *Northwestern National Ins. Co.* v. *Lee*, 49 F. 2d 274, 278-279 (D. Ore., 1931) (disc. against foreign insurance co.);
   (b) *Joseph Triner Corp.* v. *Frank McCormick, Inc.*, 11 F. Supp. 145, 147 (D. Minn., 1935)
3. *State*
   (a) *Arkansas Commerce Comm.* v. *Arkansas & Ozarks Ry Co.*, 235 Ark. 89, 357 S.W. 2d 295, 299 (1962);
   (b) *Silver* v. *Silver*, 108 Conn. 371, 143A. 244 (1928) (dissent), affirmed 280 U.S. 117;
   (c) *Minneapolis Federation of Teachers* v. *Obermeyer*, 275 Minn. 347, 147 N.W. 2d 358, 369-370 (1966) (dissent);
   (d) *Richter* v. *City of Lincoln*, 136 Neb. 289, 285 N.W. 593, 598-599 (1939);

Thus in a case substantially like the case at bar the Kansas Supreme Court invalidated on equal protection grounds a statute which subjected corporation-owned cemetery lands to taxation, while it exempted such lands when owned by individuals. Relying heavily on the *Quaker City Cab* case to hold that the 14th Amendment forbids unjust discrimination between individuals and corporations in respect to taxation of their properties,

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[2] (Continued)

(e) *Weimer Storage Co.* v. *Dill,* 143 N.J.E. 307, 143 A. 438, 441 (1928);
(f) *Wiramal Corp.* v. *Directors of Division of Taxation,* 36 N.J. 201, 175 A. 2d 631, 637 (1961);
(g) *Community Public Service Corp.* v. *New Mexico Public Service Comm.,* 76 N.M. 314, 414 P. 2d 675, 678-679 (1966), cert. den. 385 U.S. 933;
(h) *Methodist Book Concern* v. *Galloway,* 186 Ore. 585, 208 P. 2d 319, 322-323 (1949);
i() *Redfield* v. *Norblad,* 135 Ore. 180, 292 P. 813, 820 (1930), reh. den. 295 P. 461;
(j) *City of Philadelphia* v. *Deputy,* 431 Pa. 276, 244 A. 2d 741, 744 (1968) (dissent);
(k) *Martin* v. *Richardson,* 160 S.C. 370, 158 S.E. 731, 733 (1931);
(l) *Xepapas* v. *Richardson,* 149 S.C. 52, 146 S.E. 686, 691 (1929);
(m) *Group No. 1 Oil Corp.* v. *Sheppard,* 89 S.W. 2d 1021, 1025 (Tex. Civ. App., 1935);
(n) *State* v. *Standard Oil Co.,* 130 Texas 313, 107 S.W. 2d 550, 558 (1937);
(o) *Aberdeen Savings & Loan Assn.* v. *Chase,* 157 Wash. 351, 289 P. 536, 541 (1930), reh. den. 290 P. 697;
(p) *H. Rouw Co.* v. *Texas Citrus Comm'n.,* 247 S.W. 2d 231, 234 (Tex. 1952)

But see: *Pennsylvania* v. *Life Assurance Society of Penna.,* 419 Pa. 370, 214 A. 2d 209 (1965), app. dis. 384 U.S. 268; *Spector Motor Service, Inc.* v. *Walsh,* 135 Conn. 37, 61A.2d 89 (1948)

the Kansas court observed, *Mt. Hope Cemetery Co.* v. *Pleasant*, 139 Kan. 417, 32 P. 2d 500, 503 (1934):

> "But it [the legislature] will have to tax all privately owned cemeteries alike; and it will not be possible within the limits of our Constitution nor that of the United States to enact a valid statute which shall tax the plaintiff's cemetery because its ownership is vested in a corporation while exempting a neighboring cemetery because the fee title thereto is vested in the bishop of the diocese."

The discriminatory nature of the tax in the instant case is even more pronounced. It taxes all corporations, but no individuals.

A personal property tax with a similar discriminatory classification was likewise invalidated under the 14th Amendment in *Garysburg Mfg. Co.* v. *Pender County*, 42 F.2d 500 (E.D.N.C., 1930), rev'd other grounds, 50 F. 2d 732 (4th Cir., 1931) (failure to exhaust administrative remedies; dismissed). North Carolina by statute taxed stock in foreign corporations owned by domestic corporations, but it exempted stock in foreign corporations owned by individuals. The court's decision relied heavily on *Quaker City* and the *San Mateo* and *Santa Clara* railroad tax cases, which, to the court, made it obvious that the tax created an unconstitutional, substantial and arbitrary discrimination between an individual and a corporation.

Contrary to Petitioners' implications, *Quaker City Cab* is not the only relevant Fourteenth Amendment decision by this Court invalidating a state taxation scheme. In *Concordia Fire Insurance Co.* v. *Illinois*, 292 U.S. 535 (1934), for example, this Court invalidated an Illinois *ad valorem* personal property tax upon net receipts from casualty insurance received by foreign fire insurance com-

panies, but not upon net receipts from casualty insurance received by foreign casualty insurance companies. Pointedly, the Court noted, *id.* at p. 549:

> "There is no basis or reason for making a distinction between them [companies] that has any pertinence to the imposition of a property tax such as is in question. The net receipts which are taxed are not different from those which are not taxed; and both came from the same source. *Such a discrimination in respect of the taxation of real or tangible personal property obviously would be essentially arbitrary.* In principle it is not different with the net receipts." (Emphasis added).

See also: *Hanover Fire Insurance Co.* v. *Harding*, 272 U.S. 494 (1926) (Illinois tax); *Iowa-DesMoines Bank* v. *Bennett*, 284 U.S. 239 (1931); *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23 (1931); *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32 (1928); *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920).

Despite this showing of the vitality of the *Quaker City* doctrine it is argued by those seeking reversal of the Illinois Supreme Court decision that this case has been undermined by certain subsequent decisions of this Court. We now turn to a consideration of those cases cited by them.

Most of the cases relied upon by Petitioners are distinguishable in the framework of the proposition that the tests of validity of taxes depend upon their nature. The three general classes of taxes are *ad valorem* property taxes, income taxes and excise taxes. Fourteenth Amendment tests for one class of such taxes are not necessarily appropriate for another class. Hence, a distinction valid for one purpose will not necessarily be valid for another. *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32,

38 (1928). Ownership of property is not a relevant issue in the case of excise and income taxes.

Property taxes, including taxes on the ownership of property, are based upon value of property possessed in a certain place at a certain time. These are direct taxes. The value of similar property may vary based upon its use. We assert that there is no rational difference in property based solely on the nature of the owner, whereas there can be differences in value based upon the use to which that property is put, *e.g.*, business or non-business use.

Special property classification statutes based on use, such as by railroads, other common carriers, utilities and the like, generally are not denials of equal protection because of the peculiar use of the property, its protected, quasi-public status, and special public policy considerations—rather than ownership *per se*. Among the special cases in this category erroneously relied upon by petitioners as adverse to the *Quaker City* doctrine, is *New York Rapid Transit Corp.* v. *City of New York*, 303 U.S. 573 (1938). This Court there held that a special New York tax on utilities and common carriers did not deny equal protection, since these entities enjoyed special status "including relative freedom from competition." *Id.*, p. 579. Such taxation is justified under the Fourteenth Amendment essentially as a matter of fair equivalence.

Excise taxes are not direct taxes. These taxes essentially are levied incident to the enjoyment of a privilege, engagement in an occupation, or performance of an act. Since a State under its police power may prohibit such enjoyment, engagement or performance, it is empowered to impose restrictions or special burdens by taxation.

Among the excise tax decisions erroneously relied upon by petitioners is *Ft. Smith Lumber Co.* v. *Arkansas*, 251 U.S. 532 (1920). An Arkansas statute imposed a tax upon capital stock held by a domestic corporation in other corporations, while individuals holding such stock were exempt. This Court found no denial of equal protection. The State, within the permissible public policy of discouraging the holding of stock by one corporation in another, essentially imposed an excise upon enjoyment of that privilege. A second distinguishable excise tax decision is *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1910) (5th Amendment; federal excise tax). The Court therein established that an excise tax may reasonably be imposed upon corporations alone. The principle of fair equivalence operates in this category also.

Taxes upon income are not imposed upon property, and may or may not be tied to privilege, occupation or performance of an act. These are taxes upon the proceeds arising from property or business, *i.e.*, upon the privilege of earning or receiving income. While such a tax has been classified an excise tax, it generally is not considered a property tax, or tax on source. One case in the income tax category relied upon by petitioners is *Thorpe* v. *Mahin*, 43 Ill. 2d 36, 250 N.E. 2d 633 (1969). The Illinois Supreme Court therein held that the new Illinois income tax is not a property tax (*id.*, 43 Ill. 2d at 42); also that the tax, which imposed a higher tax rate upon corporations than the rate on individuals did not violate equal protection, because of "sufficient differences between the privilege of earning or receiving income as a corporate entity and . . . as an individual." *Id.*, at page 47. The Court also found substantial statutory differences in tax treatment, *e.g.*, allowable deductions, between corpora-

tions and individuals tending to bring about a parity of burden.

Other excise and income tax cases and special property classification cases cited by petitioners are similarly distinguishable.

Another type of case relied upon by Petitioner is to be distinguished because it involved overriding public policy considerations which rendered the discrimination permissible. *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959), involved an Ohio ad valorem tax on the contents of Ohio warehouses, but exempted from taxation such property held for storage only, if owned by non-residents. The discrimination favored non-residents as against residents, not individuals as against corporations. The Court upheld the statute on Ohio's overriding public policy of encouraging industry, *id.,* at p. 528:

> ". . . a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment."

Allied Stores involved no classification based upon ownership *per se.*

A different but equally justifying public policy consideration was found in *White River Co.* v. *Arkansas,* 279 U.S. 692 (1929). An Arkansas statute provided for collection of back taxes from corporations, but not individuals, on property which escaped equitable taxation due to inadequate or insufficient valuation. The Court observed that a back-tax statute differs from "an ordinary tax law in which there may be some foundation for the claim that the legislature is expected to make no discrimination".

Id., at p. 697. The Court expressly distinguished *Quaker City Cab Co.*, supra, on that ground and found no denial of equal protection. *Id.*, at pp. 696, 699.

Summarizing, in all of the cases relied upon by petitioners, a reasonable ground (not arbitrary as here) for the classification existed and usually the discrimination rested upon a showing of fair equivalence or strong public policy. No such grounds exist and no such state policy is discernible in the instant case as we will next show.

II.

NO VALID PUBLIC POLICY SUPPORTING THE PROPOSED DISCRIMINATION AGAINST CORPORATIONS CAN BE FOUND IN THE LEGISLATIVE HISTORY OF ARTICLE IX-A READ ALONE OR IN CONJUNCTION WITH THE NEW CONSTITUTION OF 1970 OR THE DELIBERATIONS OF THE CONSTITUTIONAL CONVENTION WHICH DRAFTED IT.

Neither Petitioner, nor any other party herein, seriously contends that the personal property tax sought to be imposed solely on corporations by the constitutional amendment is an excise, privilege, occupation or special property classification tax. Thus Petitioner's dilemma short of urging total abandonment of equal protection for corporate persons, is to attempt to justify the discriminatory classification by asserting it to be based on or in furtherance of a valid state policy. Petitioner strains hard, and unsuccessfully, to find such a valid state policy.

(a) Petitioner first contends that the "basic purpose of the Article was to eliminate individual personal property tax in Illinois—a tax which even opponents of Article IX-A admit is discriminatory, unfair, almost impossible

to administer and economically unsound." Brief, p. 13. Of course, the intent of the constitutional amendment is clear on its face and was explicitly stated in the Explanation of Amendment (App. p. 19) as follows: "The Amendment would abolish the personal property tax by valuation levied against individuals."

This demonstrates no valid policy justification whatever, only an acknowledged intent to discriminate. Petitioner's first attempt to find policy thus begs the question; it is to say that the discrimination against corporations is *permissible* because it was *intentional.*

Such a purpose would be unexceptional and within the power of the legislature and the electorate only if individuals alone had been subject to the tax in the first place. Petitioner's less than careful references to the asserted purpose of eliminating "the individual tax" and to eliminate "individual personal property tax in Illinois" (Brief p. 13) somewhat casually overlook the fact that prior to the adoption of the new constitutional provision *all* personal property in Illinois was subject to tax. The constitutional amendment did not alter the definition, classifications or rate of assessment; its only effect was to exempt a certain class of owners from payment of a pre-existing tax and to leave corporate persons alone subject to the tax.

Petitioner's quite candid explanation is that the discrimination is justified by the comparative ease of collection against corporations of a tax described by petitioner as "discriminatory, unfair, almost impossible to administer and economically unsound". Petitioner is thus urging that Illinois be allowed to classify corporations because they and not individuals are "readily identifiable" and thus susceptible to coercive measures with respect to payment

of taxes. Brief p. 13-14. No court has ever sanctioned such a distinction as being consonant with equal protection.

(b) The legislative history affords no foundation for Petitioner's gratuitous assertion that the purpose of Article IX-A was "to encourage the delegates to the state constitutional convention which was then in session" to revise the Illinois tax system. Contrary to that assertion, the convention was not in session either at the time of the drafting of Article IX-A or the referendum of Nov. 3, 1970, when the amendment was approved by the electorate. In fact at the time of legislative adoption of Senate Joint Resolution 30 the delegates had not yet been chosen.

There is not a scintilla of evidence in the record to suggest that the legislature, in adopting Article IX-A on June 30, 1969 had as its high motive the instruction and encouragement of then unchosen delegates in the merit and virtue of revenue reform. With the new and less-than-popular Illinois income tax about to become effective August 7, 1969 it would be more plausible to speculate that S.J.R. 30 (Art. IX-A) when adopted by the legislature was intended to relieve political pressures resulting from the income tax by offering individual voters exemption from personal property tax as at least a partial off-set.

If, for purposes of present argument, 'encouragement' of 'reform' is accepted as the legislative goal, one can only observe that such a goal would scarcely be advanced by discrimination between corporations and individuals. A tax scheme is neither modernized nor reformed when a tax acknowledged to be unjust is discriminately maintained against one class and removed from another. A constitu-

tion ought not to play favorites among classes of taxpayers.

Actually the official statement accompanying the proposed Amendment when submitted to the electorate disclosed no intention whatever that in the future the personal property tax as to corporations would be ended. In fact, the Explanation accompanying the Amendment explicitly stated that the tax on corporations would not be affected (App. p. 19). Actually that was a candid and correct admission since the subsequent Convention's decision concerning personal property taxes could not be known or forecast.

(c) In the same effort to find a saving purpose or state policy Petitioner argues that since "(i)t was financially impossible to totally abolish the tax immediately," (Brief p. 21) and since the tax was effectively administered as to corporations but not as to individuals (Brief p. 21), therefore, it was "reasonable" to exempt only individuals from liability. The clear import of this reasoning, especially since the "reform" was submitted for ratification to the very persons it would benefit most, is that the Illinois legislature wished to have the best of two worlds; namely to take a politically popular action by removing the tax as to individual voters without sacrificing substantial revenues needed by the schools and municipalities of the state. Corporations, defenseless at the polls and the source of the bulk of the property tax receipts, would continue to be liable.

A state "policy" of this description can hardly be said to validate a discrimination so clearly in violation of the equal protection clause. Not surprisingly the constitutional amendment was approved by an "overwhelming

majority" vote as Petitioner finds comfort in pointing out. Brief p. 21. That is no answer. Political popularity cannot cloak a denial of equal protection with validity. Equal protection can not be denied even by overwhelming vote. *Lucas* v. *44th General Assembly,* 377 U.S. 713, 736-737 (1964).

(d) Petitioner also urges that since the Illinois Constitutional Convention, and subsequently the electorate, did adopt a provision which would eventually eliminate all personal property taxes by 1979, Illinois Constitution of 1970, Article IX, sec. 5(c), the prior Article IX-A amendment of the old Constitution must be seen as the "first step" in a comprehensive plan of reform. Petitioner's Brief at 14. This after-the-fact rationalization is not supportable.

Petitioner would justify the invidious discrimination implicit in the constitutional amendment by urging upon this court that there is a public policy in Illinois which looks to ultimate abolishment of all *ad valorem* personal property taxation. That such a long-range policy exists is clear; that such a policy cannot justify and was not intended to justify violation of the equal protection clause is equally clear. Petitioner asserts (and the State's Attorney of Cook County makes a similar argument—see Part IV hereof) that Article IX-A was the initial step in a program of the new Constitution to end all such taxation by 1979. These interpretations are at the best but half truths and petitioners are totally in error if they mean to assert that the new Constitution mandated immediate abolishment of individual personal property taxes. To the contrary, the new constitution carries forward only such individual exemptions under Article IX-A as shall ultimately be defined and held valid by the courts. That,

of course, is what the present case is all about and hence petitioners beg the question by their circuitous argument. The convention was fully aware of the 'equal protection' problems involved in the amendment. Thus the convention chose neither to accept nor to reject Article IX-A. It followed the middle-course of Sec. 5(c) of Article IX hereinafter quoted.

The delegates to the Sixth Illinois Constitutional Convention were aware of the existence of the legislative enactment which was to become Article IX-A. The Convention adopted the proposed constitution on September 3, 1970. Two months later the voters would pass on Article IX-A. The Convention delegates accordingly were required to give thought to the effect of the adoption of Article IX-A upon the proposed new Constitution. The Convention could have ignored the amendment to the 1870 Constitution and provided for it to lapse at the effective date of the new Constitution. It was felt, however, that since public consideration of the amendment would take place shortly before the submission of the new Constitution the effect of its likely adoption should be provided for in the future organic law of the state. This latter view prevailed in the convention and is reflected in Section 5 of Revenue Article IX of the 1970 Constitution:

> (a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.
>
> (b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.
>
> (c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal

property taxes and concurrently therewith shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3(a) of this Article.

These three sections are also in a real sense a contemporaneous interpretation of the limited scope of Article IX-A in providing as they do for (1) continuation of taxation of personal property, with provisions for classification and abolition of any or all classes; (2) the provision of subparagraph (b) upholding any abolition of ad valorem personal property taxes occurring in consequence of the constitutional amendment prior to the effective date of the 1970 Constitution, and (3) the detailed provisions for ultimately "phasing out" all remaining personal property taxation on or before January 1, 1979, subject to the replacement of lost revenue by forms of taxation other than real and personal property taxes on the same classes of taxpayers relieved of personal property taxation after January 2, 1971.

Thus, throughout its deliberations, the Constitutional Convention was faced with a severe drafting dilemma. It was necessary for it either to structure any revenue article of a new constitution with concern for the meaning, application and legal effect of the pending constitutional

amendment—matters which were anything but clear; or it could proceed to draft new provisions with total disregard of the pending proposition—a course publicly unacceptable. The difficulty was also compounded by the doubts which existed concerning the interpretation of the word "individuals" as used in the amendment and doubts concerning the constitutionality of particular interpretations under the equal protection clause. A measure of the uncertainty felt by many delegates to the Convention was aptly expressed in floor debate by Stanley C. Johnson, a member of the Revenue Committee, who stated:

> "Mr. President, the amendment in November is clouded with so much uncertainty as to its application that we will be years, we fear, trying to figure out what it really means. There have been opinions registered that it will not apply to joint tenants, that it will not apply to trusts, that it will not apply to partnerships. Certainly it will not apply to corporations. So that it may eventually boil down to what it applies to is whether or not the property is used in the production of income or not." (June 25, 1970, Transcript Vol. 74, p. 11)

Professor Dawn Clark Netsch, who served as Vice Chairman of the Revenue Committee (referring to Section 5(b) of Article IX of the Constitution of 1970, hereinabove quoted) writing in the November, 1970 issue of the Chicago Bar Record, p. 114:

> "The coverage of this subsection depends, in turn, on the coverage of the proposed November amendment abolishing the tax 'as to individuals'. Presumably, the courts will have settled these questions by the time the personal property tax is finally eliminated in 1979. If the courts should decide—possibly to avoid equal protection issues—that an individual engaged in a retail grocery business as a sole pro-

> prietorship is not relieved of paying the personal property tax pursuant to the November referendum because his competitor down the street, who is incorporated, is not relieved, that business individual would be picked up by subsection (c) and relieved of the tax in the second phase-out. He would then be liable for a share of the replacement tax."

Delegate Malcolm S. Kamin in his article "Constitutional Abolition of Ad Valorem Personal Property Taxes, 60 Ill. Bar Journal, p. 432 at 434 writes:

> "It was generally agreed that the voting public would pass this amendment, whatever its precise meaning. Thus, one must consider that throughout debate on the Revenue Article, every delegate probably had in mind that members of the public would be expressing themselves in overwhelming favor of Article IX-A at about the same time they were being asked to vote on the product of the Convention."

In this context of timing problems and uncertainties as to meaning and legality the Convention drafted a constitutional program, subsequently approved by the voters, which provided for legislative phasing out of all ad valorem personal property taxation by 1979, with safeguards to avoid disastrous results to the public schools and municipal services. The program did not mandate the immediate exemption of individuals from personal property taxation as suggested by petitioners. It merely provided for the recognition of such abolition of individual personal property taxation, *if any,* as the courts would determine to have occurred under the preceding constitution as amended by Article IX-A.

Even if the Convention had sought to incorporate Article IX-A into the new constitution, which petitioners er-

roneously contend was the case, it is obvious that such an incorporation could not validate a provision repugnant to the 14th Amendment of the Federal Constitution. The Cook County State's Attorney in effect is really arguing that even if Article IX-A creates an unconstitutional exemption, that defect will be cured in the course of 8 years as everyone becomes exempt. No cases or theories can be cited to support such an ephemeral and transitory view of equal protection.

The basic question remains unaffected by the new Illinois Constitution. That question is whether or not the creation of a given classification of property taxpayers finds its justification in more than a desire to free one class from taxation while imposing a property tax upon another. Certainly any future classification adopted by the Illinois General Assembly pursuant to Article IX, Section 5(a) of the new Constitution will be similarly tested under Federal standards. The adoption of Section 5(c) obviously did not validate the unconstitutional Article IX-A.

From the foregoing it is clear that no valid state policy exists to justify the patent discrimination against corporations and that petitioners' efforts to find such a policy wholly fail. It is equally clear that the Illinois Supreme Court was correct when it found: "It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set."

III.

THE REVERSAL OF THE ILLINOIS SUPREME COURT'S OPINION WOULD END EQUAL PROTECTION OF THE LAWS FOR CORPORATE PERSONS AND WOULD HAVE VASTLY DESTRUCTIVE LEGAL, SOCIAL AND ECONOMIC CONSEQUENCES.

We have shown in the first two argument headings of this brief that the Illinois Supreme Court conclusively determined the purported exemption for "individuals" contained in Article IX-A applied to all non-corporate persons and that no valid policy consideration exists for this distinction between property owned by individuals and property owned by corporations for the purpose of taxation. We have also shown that a long line of cases would prohibit such a classification based upon equal protection grounds. A series of cases has been cited extending over a period of 90 years which exemplify this rule. However, both realistic jurisprudence and this Court's granting of certiorari in this case indicate that mere reliance upon the existence of long-standing rules may not be in itself sufficient to prevail. Therefore, these amici do contend in this brief that the judgment of the Illinois Supreme Court is not only in accordance with the rule of *stare decisis* but also continues constitutional protections in an area where such protections are practically desirable. In short, corporations "ought" to be accorded the equal protection upon which they have relied for so long. An analysis of this issue requires a consideration of the evolution of constitutional rights accorded to corporations in this country.

The American concept of equal protection extends from the basic American ideal of fairness. *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). At common law, the term

"person", including both natural persons and artificial persons, generally included corporations. *Louisville, C. & C. R. Co.* v. *Letson,* 43 U.S. 497, 555, 558-559 (1844). The Supreme Court of the United States quickly reached the same definition of "person" in construing the equal protection clause of the 14th Amendment. *Santa Clara County* v. *Southern Pacific R. Co.,* 118 U.S. 394, 396 (1886). The Court stated in *Gulf, Colorado & Sante Fe Ry. Co.* v. *Ellis,* 165 U.S. 150, 154 (1897):

> "The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

Perhaps because it is not a static concept, "equal protection of the laws" escapes precise definition, *Louisville Gas & Electric Co.* v. *Coleman,* 277 U.S. 32, 37 (1927). This Court has construed the provision as a general requirement that all persons and their property in similar circumstances be treated equally by the State in its exercise of powers, including the power of taxation. The decision of the Illinois Supreme Court in the cases at bar is consistent with this historical evolution of the Equal Protection clause. A reversal of these decisions would eliminate the sound, long-standing principle of equal protection that artificial and natural persons be treated equally for property taxation purposes.

Thus in the decisions of this Court since 1844, in principle, and since *Quaker City,* (1928) in fact, corporations have been treated no differently than other "persons"

regarding the imposition of ad valorem property tax. While reasonable classifications based upon the use or the nature of property are allowable, the attempted creation and discrimination against a class based solely upon ownership alone has been held impermissible.

The petitioners and three of the respondents in this case ask this Court to take a constitutionally startling action. They seek the removal of equal protection guarantees from a class which by everyone's admission, has previously been entitled to such protection. No case has been cited by any party seeking reversal of the Illinois Supreme Court which even remotely provides authority for such a step. The history of the equal protection clause has been one of expansion rather than withdrawal. Could the petitioners and their supporters reasonably contend that property owned by Irish, Jewish, or Black persons should be taxed differently than that owned by other persons? In such a formulation the question begs the answer. It would be inconceivable that these groups, entitled as they are to equal protection of the laws, could have such right removed. The attempt to discriminate against corporations in this case is constitutionally indistinguishable from such an attack upon an ethnic, religious or racial group.

The petitioners, in effect, ask that corporations henceforth be declared and treated as "non-persons" for the purpose of Federal constitutional protections. Such a step would be totally out of keeping with basic constitutional principles as well as prior rulings in Supreme Court cases. While the principle of *stare decisis* may not always carry the day, it is surely not likely to be ignored by this Court. One of the central elements in the stability of our legal system is the ability of citizens to be free from abrupt and unheralded changes in the

law. In some instances a change can be foreseen based upon a series of slight modifications of a given rule. The rule expressed in the *Quaker City Cab* case is, however, true black letter law.*

Such law has been relied upon by state and local taxing authorities and by corporate and non-corporate businesses as providing a norm of reference believed to have been established with finality by this Court. Every state in the union allows the levying of a local real property tax. With the exception of Delaware and New York, every other state in the country levies a personal property tax of some kind. Corporations have reasonably relied in their acquisition of billions of dollars of real and personal property upon the fact that their property would be treated no differently for tax purposes than identical property held under other forms of ownership.

To reverse this rule after 90 years of stability would bring about a change in the tax structure of this country by judicial action which would have destructive and wasteful effects. Small corporate businesses would be placed at a serious economic disadvantage as against identical businesses operated under other ownership forms. Larger corporations would seek evasions of the unjust classification by placing their property in the hands of natural persons. All corporations would be required to react in

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*"Unless specifically exempted, all corporate property, real or personal, is subject to tax in the same manner as if it were held by an individual. However, there must be no discrimination as between individuals and corporations in the same class." (Citing Quaker City Cab)
[Prentice-Hall
State & Local Taxes
All States Unit
Sec. 93, 638]

various ways to their loss of constitutional protections. None of these reactions would be helpful to economic growth.

The arguments in the cases at bar involve an Illinois tax relied upon principally by school districts and the exemption of natural persons from that tax. The implications of this case, however, effect every state in the union and every business which operates in the corporate form. If the Illinois Supreme Court be reversed, widespread state experimentation in the creation of additional burdens resting solely or differently upon corporations will surely follow.

A prime example of such experimentation would be the placing of the entire burden of ad valoren property taxation upon corporations. While the cases at bar involve the imposition of a tax only upon personal property such a tax is indistinguishable in its equal protection implications from a tax upon real property. Thus, if the property of corporate persons may be taxed while that of natural persons is exempt the same is true of real property. Such a ruling would place corporate real property in a position where it might become the sole source of the 41½ billion dollars in property taxes collected each year by state and local governments. In the past such governmental bodies have been somewhat restricted in the nature and amount of such property taxes since they were payable by all property owners. The voters of a community had a sure method of telling their elected officials when the property tax burden had become too high. Corporations however do not vote and as is pointed out by the petitioners they generally pay their taxes. If a state legislature can answer the voters' cry for more funds by an increase in the corporate real property tax

it can escape the citizens wrath at the polls. Stripped of their equal protection guarantees in the area of real and personal property taxation corporations become not taxpayers but targets.

Once corporations have lost their equal protection clause rights, the governmental experimentations in creating special burdens will not stop at taxation. If a corporate property tax is possible then there is no reason why distinctions may not be made against corporations in the exercise of the police power. Corporate owned property might be required to comply with a different building code or zoning ordinance than property held in a different manner. Corporations could be required to pay state and municipal fees in amounts different than fees payable by natural persons for similar services. Corporations could be charged a higher rate for water, sewer or electricity than a non-corporate user in the same industry. Untold discriminations could and would result if a class with many wealthy members were to suddenly lose its constitutional guarantee of fairness and equality.

It is perhaps ironic that four medium or small school districts in Illinois should be placed in the position of arguing on behalf of all corporations in this country. In this case, however, the perfectly proper legal interests of these amici are identical to those of business corporations. These amici are not opposed to constitutionally valid exemptions of personal property taxation. We feel, however, that as guardians of the educational well-being of the children of our school districts we have a responsibility to see that all taxes validly imposed within the state are collected and that improper exemptions are contested. The interest of corporations is, of course, to pay no more taxes for real or personal property than

any other owner of such property. In this case, those interests coincide.

It would surely be of interest to this Court that the Illinois General Assembly has recently taken a substantial step towards rectifying the constitutional errors which we contend were committed in the drafting of Article IX-A. The Legislature, on June 13, 1972, passed House Bill 4218. That bill provides a standard deduction for personal property tax purposes of $5,000.00 of personal property owned by any taxpayer within the state, corporate person or natural person. Whether such a device escapes all constitutional infirmities is perhaps a question for another court on another day. The fact remains, however, that the creation of such a flat deduction, available to all taxpayers (both corporate and individual) alleviates the obvious lack of equal protection apparent from Article IX-A. The petitioners in this case argue as if Article IX-A is the only way to free the citizens of Illinois from a hated tax. The passage of House Bill 4218 and the mandate for the phasing out of of all personal property taxation contained in the 1970 Illinois Constitution will shortly accomplish the sought after goal in a constitutionally permissible manner. For wont of such approach, the constitutional rights of corporations throughout the country ought not be sacrificed in the name of Illinois tax relief.

IV.

THE ILLINOIS SUPREME COURT DID NOT IGNORE OR OVERLOOK THE NEW ILLINOIS CONSTITUTION, AS ARGUED BY THE COUNTY OFFICERS, BUT CORRECTLY CONCLUDED THAT THE BASIC FEDERAL QUESTION, INVOLVING VIOLATION OF THE EQUAL PROTECTION CLAUSE, REMAINED UNAFFECTED BY THE ADOPTION OF THAT DOCUMENT.

In this section these amici direct their arguments to the Petition for Writ of Certiorari to the Illinois Supreme Court, filed by the State's Attorney of Cook County on behalf of Edward J. Barrett and other county officers. The State's Attorney has chosen to submit his Petition for Writ of Certiorari as his brief in this court. These amici attempted to meet the arguments raised by the State's Attorney in their previously filed Brief In Opposition to the granting of certiorari. Much of what follows was submitted in that earlier brief but is set out here for the convenience of the Court.

The petition for writ of certiorari, standing as the brief of Edward J. Barrett, County Clerk of Cook County, et al., is devoted almost completely to arguments concerning the adoption of the Illinois Constitution of 1970 which became effective several days prior to the rendition of the opinion and judgment herein sought to be reviewed. Without explaining how the new Constitution remedied the invidious discrimination implicit in Article IX-A of the 1870 Constitution and violative of the equal protection clause, petitioners charge that the Illinois Supreme Court ignored the new constitution, which in their view introduced a new dimension in this case. In developing this theme, they present a number of unsupported and irrele-

vant variations. For example, in "Questions Presented" they gratuitously demand to know how "the highest court of the state can ignore the existence of the new state constitution . . . and circumscribe the extent of its examination in determining the public policy of the state . . ." They ask how the court could ignore the context in which Article IX-A of the prior constitution was adopted, claiming the constitutional amendment which was held invalid was "the first step of the program provided in the new constitution for the eventual abolishment of the personal property tax." They strongly imply that either by oversight (Pet. p. 39) or by deliberate design (Pet. p. 5) the Illinois Supreme Court ignored its own precedents and failed to apply the law existing at the time of decision in favor of the law existing at the time the case arose. Petitioners even go so far as to argue that by failing to mention the new constitution of 1970 in its opinion, the Illinois Supreme Court "caused to be born . . . a substantial federal question impelling this court's consideration . . ." (Pet. p. 5).

We take issue with these arguments of the petitioners. The contention that the Illinois Supreme Court ignored or overlooked the advent of the Illinois Constitution of 1970 is totally unsupportable in point of fact. The petitioners' arguments that the Constitution of 1970 requires validation of Article IX-A are likewise without merit in point of law.

To argue that the Illinois Supreme Court and Mr. Justice Schaefer in writing his opinion would ignore or overlook such an important development in the supreme law of the state as the taking effect of a new constitution is scarcely plausible on its face. The facts are totally the other way. Both in the briefs and in the oral argu-

ments presented to that Court, the new constitution was the subject of serious and repeated references by counsel for the several parties. The leave granted to these amici (as petitioners in *Maynard* No. 44308) in the Illinois Supreme Court to file as a matter of original jurisdiction their petition for declaratory judgment, was in response to their petition which recited the importance of considering the new constitution, as well as the old, in deciding the issues of the case and contained their offer to make such a presentation to the Court. One of the attorneys for the amici, Samuel W. Witwer, who participated in the arguments before the Illinois Supreme Court, served as President of the Sixth Illinois Constitutional Convention, the body which drafted the new constitution. Clearly the court was aware of the new constitution and its provisions relating to personal property taxation.

It should be obvious that there is no rational basis for concluding, as petitioners have done, that because the court failed to mention the new Constitution in its opinion it either ignored or overlooked the document. This basic fact cannot be sidestepped by the reiteration of incantations concerning the "exquisite, juridical intimacy" (Pet. p. 3) of old and new constitutions, unwarranted charges of judicial oversight or neglect and similar arguments designed to ignore the fundamental issue. It is evident from the opinion that the court viewed the basic Federal constitutional question, *i.e.*, the violation of the equal protection clause, as unaffected by the emergence of the Illinois Constitution of 1970.

V.

THE INTERPRETATION OF ARTICLE IX-A ADOPTED BY THE TRIAL COURT IN THE LAKE SHORE CASE IS INCONSISTENT WITH THE RULES OF STATUTORY INTERPRETATION, WOULD PERMANENTLY ABOLISH ALL PERSONAL PROPERTY TAXES AND CAUSE FINANCIAL CHAOS FOR SCHOOLS, MUNICIPALITIES AND ALL OTHER PUBLIC BODIES IN ILLINOIS.

In the trial court, Lake Shore Auto Parts Co. procured an interpretation of Article IX-A which resulted in a judgment abolishing all personal property taxes for individuals *and corporations* in Illinois. That argument was rejected first by the Illinois Supreme Court and secondly by this court in its refusal to grant certiorari to Lake Shore for a reconsideration of that argument (No. 71-674). Upon the refusal of this court to grant it certiorari, Lake Shore moved that it be allowed to withdraw from the case since its sole interest before this court would be the seeking of the affirmance of its trial court victory. This court denied the motion to withdraw. We are informed that the respondent's brief to be submitted by Lake Shore will reiterate the arguments upon which the trial court decision was achieved. These amici believe that it is quite improper for Lake Shore, supposedly entrusted, as respondent, with the mission of sustaining the Illinois Supreme Court to raise these arguments in its brief. If these amici were "parties" to the litigation, they would move that the offending portions of the Lake Shore brief be stricken. Not being parties, we resubmit to this court, in substantially similar form, those arguments which we presented to the Illinois Supreme Court where we were accorded the status of parties and where we did directly answer the contentions of Lake Shore.

The plaintiff in *Lake Shore* is a corporation. That case was brought as a class action on behalf of all corporations in the state. The plaintiff most effectively represents its class when it succeeds in bringing about a total abolition of personal property taxes for corporations. The plaintiff in *Lake Shore* could not accomplish this purpose by attacking the constitutionality of Article IX-A. If Article IX-A falls, the prior provisions of Illinois law would continue in force. Under the existing Revenue Act, corporations, business entities and individuals (however, that term be defined) would continue to be subject to personal property taxation (Chapter 120, Section 499, *Illinois Revised Statutes, 1969*). If Article IX-A were to be declared unconstitutional, corporations would receive some tax relief in that they would share the tax burden with all other taxpayers in the state. But, as has been seen, the optimum success for Lake Shore Auto Parts Co. would be not the sharing of taxation but the abolition of the tax for corporations and ironically for everyone else as well. *Lake Shore* has constructed its argument with that goal in mind.

The complaint of Lake Shore Auto Parts Co. does not allege the unconstitutionality of Article IX-A; instead, the plaintiff was scrupulously careful to limit its constitutional attack to a prior existing statute rather than to the Constitutional Amendment. Its argument is as follows:

> *The Revenue Act of the State of Illinois (Chapter 120, Section 482, et seq., Illinois Revised Statutes, 1969) provided prior to the passage of Article IX-A for ad valorem personal property taxation of all real and personal property in the state with certain exceptions. The effect of the passage and approval of Article IX-A was to amend the Revenue Act so as to repeal the personal property*

tax for all but corporations. Once this amendment by implication was accomplished, it is the personal property tax statute which must itself be swept away as a violation of the 14th Amendment because of its discrimination against corporations. The result of this theory of interpretation is that the Illinois Revenue Act, as it relates to personal property is, in its entirety, declared unconstitutional.

Since the Revenue Act is the only statutory enactment of the state regarding the establishment of a personal property tax, the result of such a judicial finding would be an immediate abolition of ad valorem personal property for all taxpayers in the state.

At the trial court level in the *Lake Shore* case, the plaintiff was able to achieve the amazing result of the judicial abolition of an established and important tax by ignoring the question of the constitutionality of Article IX-A itself, and directing the court's attention only to the Revenue Act. Amici submit that the Illinois Revenue Act (which has been constitutional for thirty years) has not suddenly become unconstitutional.

Section 499 of the Illinois Revenue Act (Chapter 120, *Illinois Revised Statutes, 1969*) has, since 1939, defined the personal and real property of this state which is subject to taxation. Sections 500 through 500.23 of the Act define property put to certain uses which are granted an exemption from such taxes. It would need little argument to show that if a particular exemption adopted by statute were unconstitutional it would be the exemption rather than the entire tax which would fall. An exemption, for example, of all personal property owned by state legislators would undoubtedly fall before a constitutional attack. Such an attack, however, would leave the general personal property tax enabling section unaffected and in full force.

This case differs from that situation in only one respect. The exemption is contained not in the Revenue Act but in the Constitution. That difference, however, can hardly justify the effect of the *Lake Shore* trial court's ruling which was to uphold the enactment that created the invidious distinction and to strike down the enactment that did not. Such a strange ruling could only be the result of the trial court's misconception that as between a valid and constitutional statute and a constitutional amendment that creates an invidious classification, the statute must fall to save the amendment. Such is not the law.

In *Reitman* v. *Mulkey*, 387 U. S. 369 (1967), an amendment to the California Constitution would have repealed prior "open housing" statutes. The Supreme Court of the United States affirmed the judgment of the California Supreme Court which ruled the *amendment* to be unconstitutional and the prior statutes to remain in effect. In reaching its decisions, the California Court looked to several factors:

> "A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective (In re Petraeus (1939) 12 Cal. 2d 579, 583, 86 P.2d 343; see Griffin v. County School Board, 377 U.S. 218, 231, 84 S.Ct. 1226, 12 L.Ed.2d 256), and for its ultimate effect (Jackson v. Pasadena City School Dist. (1963) 59 Cal.2d 876, 880, 31 Cal. Rptr. 606, 382 P.2d 878; Gomillion v. Lightfoot (1960) 364 U.S. 339, 341-343, 81 S.Ct. 125, 5 L.Ed.2d 110; Avery v. State of Georgia (1953) 345 U.S. 559, 562, 73 S.Ct. 891, 97 L.Ed. 1244; Near v. State of Minnesota (1931) 283 U.S. 697, 708-709, 51 S.Ct. 625, 75 L.Ed. 1357). To determine the validity of the enactment in this respect it must be viewed in light of its historical context and the conditions existing prior to its enactment. (Select Base Materials v. Board of

Equalization (1959) 51 Cal.2d 640, 645, 335 P.2d 672; Evans v. Selma Union High School Dist. (1924) 193 Cal. 54, 57-58, 222 P. 801, 31 A.L.R. 1121; see Snowden v. Hughes (1944) 321 U.S. 1, 8-9, 64 S.Ct. 397, 88 L.Ed. 497.)"

[*Mulkey* v. *Reitman*, 50 Cal. Rep. 881, 884]

The Supreme Court of the United States specifically endorsed this method of interpretation and announced that: "Judgments such as these we have frequently undertaken ourselves." [citing cases] (387 U. S. at 373)

The *Reitman* case involved racial discrimination while the case at bar involves economic discrimination. In the *Reitman* case the Court looked to the entire state of the law. Both the constitutional amendment and the statute had to be construed together to test whether a constitutional result would be reached. When the two enactments read together led to unconstitutionality, the enactment most responsible for that result was ruled to be void. Thus this Court rejected the argument that the constitutional amendment there in question was valid while the underlying statutes must fall. The effect of the California *constitutional amendment* was to sanction racial discrimination. Likewise, in the case at bar, it is the amendment and not the (revenue) statute which affects a violation of the equal protection clause.

Article IX-A must be viewed together with other pertinent provisions of Illinois law. If, as the *Lake Shore* Court ruled, Article IX-A causes the Revenue Act to be unconstitutional, it will abolish all personal property taxes in the state. Such a result would not be consistent with the intent of the Legislature in proposing the amendment nor consistent with the intent of the people in approving the amendment. Both the Legislature and the

people contemplated that some class or classes would continue to pay personal property taxes even after the effective date of Article IX-A. Whatever the Legislature and the people had in mind, it can at least be said that they anticipated a limited tax exemption and not a total tax abolition. In *Village of Glencoe* v. *Hurford,* 317 Ill. 203, 148 N.E. 69, it was said:

> "When the literal enforcement of a statute would result in great injustice and lead to consequences which the legislature could not have contemplated, the courts are bound to presume that such consequences were not intended and will adopt a construction which it may be reasonable to presume was contemplated by the Legislature." (at 220)

The Illinois Supreme Court has also said:

> "If a statute admits of two constructions, one of which renders the enactment reasonable and salutory while the other renders it mischievous, if not absurd, the latter construction should be avoided."
>
> [*Karlson* v. *Murphy,* 387 Ill. 436, 443]

The *Lake Shore* interpretations of Article IX-A would, in the most offhanded and unconscious of ways, entirely repeal an important tax utilized by almost every public body in the state. This is due to the fact that Article IX, Sec. 5(b) of the new Constitution provides: "Any ad valorem personal property tax abolished on or before the effective date of their Constitution shall not be reinstated."

That subsection "makes room" for the limited exemption of Article IX-A by providing that any ad valorem personal property tax abolished before July 1, 1971 shall not be reinstated. If paradoxically Article IX-A is constitutional and yet (as the respondent in *Lake Shore* contends)

it, in turn, renders unconstitutional all other ad valorem personal property taxes this form of taxation may not be reinstituted. The decision of the trial court in the *Lake Shore* case would remove from the General Assembly the power to reinstitute an ad valorem personal property tax so long as Section 5(b) is contained in the 1970 Constitution. Such a result would be both bizarre and destructive.

The result would be bizarre in that it would be dictated by stilted tests of construction which would neither honor the constitutional intent nor adequately consider the effect of such interpretation. The result would be destructive in that it would in an instant cause financial chaos for school districts, municipalities and nearly all other public bodies in the state.

Illinois local governments and public bodies have been extremely limited in the sources and amounts of revenue available to them. Most public bodies in the state levy a property tax payable from the assessments of real and personal property. The percentage which this tax bears to the total public revenues varies based upon the availability of other income sources. In municipalities, annexation and license fees, fines collected from ordinance violations, utility taxes and profits from local utility services supplement the amounts received from property taxes. School districts and other special service public bodies are, however, far more limited in their sources of revenue. For them property taxes make up the predominant share of their local income. In many school districts a large percentage of revenue is attributable to the assessment of personal property. The *Lake Shore* decision would *immediately* and *permanently* wipe out this source of revenue.

The amount of assessed valuation of real and personal property has always played an important part in the financial planning of public bodies. The ability to issue bonds has been directly connected with the tax base of the public body. The amount of assessed valuation is an important factor in the ability of governmental bodies to issue bonds and in the rate of interest which they will be required to pay. If the personal property tax is totally abolished public bodies will find their tax base and borrowing powers suddenly diminished.

If all personal property taxes are declared unconstitutional as a result of this Court's adoption of the trial court's position the following named amici and other public bodies will lose, yearly, revenues in excess of the following stated amounts:

Proviso Township High School District #209	$ 1,752,231
Cicero Grade School District #209	$ 1,203,169
County of Cook	$19,837,514
Metropolitan Sanitary District	$ 7,746,448
City of Chicago	$11,625,517
Chicago Board of Education	$70,102,183
Chicago Park District	$13,662,772

Substantial reduction in the tax base of all public bodies in the State would occur and the statewide loss in yearly revenues for school districts, municipalities, counties and other public bodies would exceed $250,000,000.00.

These amici and the class they represent are unlike private corporations which can expand and contract their production based upon the availability of capital. A school district must teach all the children enrolled; a sanitary district must treat all the sewage it receives; and, a city cannot provide police services only three days a week. The new Constitution was drafted with this in mind and

therefore provides in Article IX Section 5(c) for the replacement of all personal property taxes abolished. We ask the court to take judicial notice of the difficulties faced by public bodies in recent years in providing a full and effective range of services upon revenues undiminished by personal property tax exemptions.

CONCLUSION

In a well litigated and vigorously contested lawsuit the Illinois Supreme Court found that the Constitution of the United States would not be bent so as to make corporations the only payers of the Illinois ad valorem personal property tax. The Court, perhaps realizing that corporations can hardly defend themselves at the polls against invidious discrimination, rejected the attempts of legislators to bestow such a singular burden upon them. The Illinois Supreme Court relied upon established precedents of this Honorable Court in reaching its politically unpopular but legally correct and just result. This Court should affirm the decision of the Illinois Supreme Court which held, in effect, that the equal protection clause of the 14th Amendment does not shift with prevailing political winds.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1972

[redacted]

Petitioner,

No. 71-605 vs.

LAKE SHORE AUTO PARTS CO., et al.

Respondents.

[redacted]

Petitioners,

No. 71-606 vs.

[redacted]

Respondents.

On Writs Of Certiorari To The Supreme Court Of Illinois

BRIEF OF LAKE SHORE AUTO PARTS CO., ET AL., RESPONDENT IN NO. 71-605

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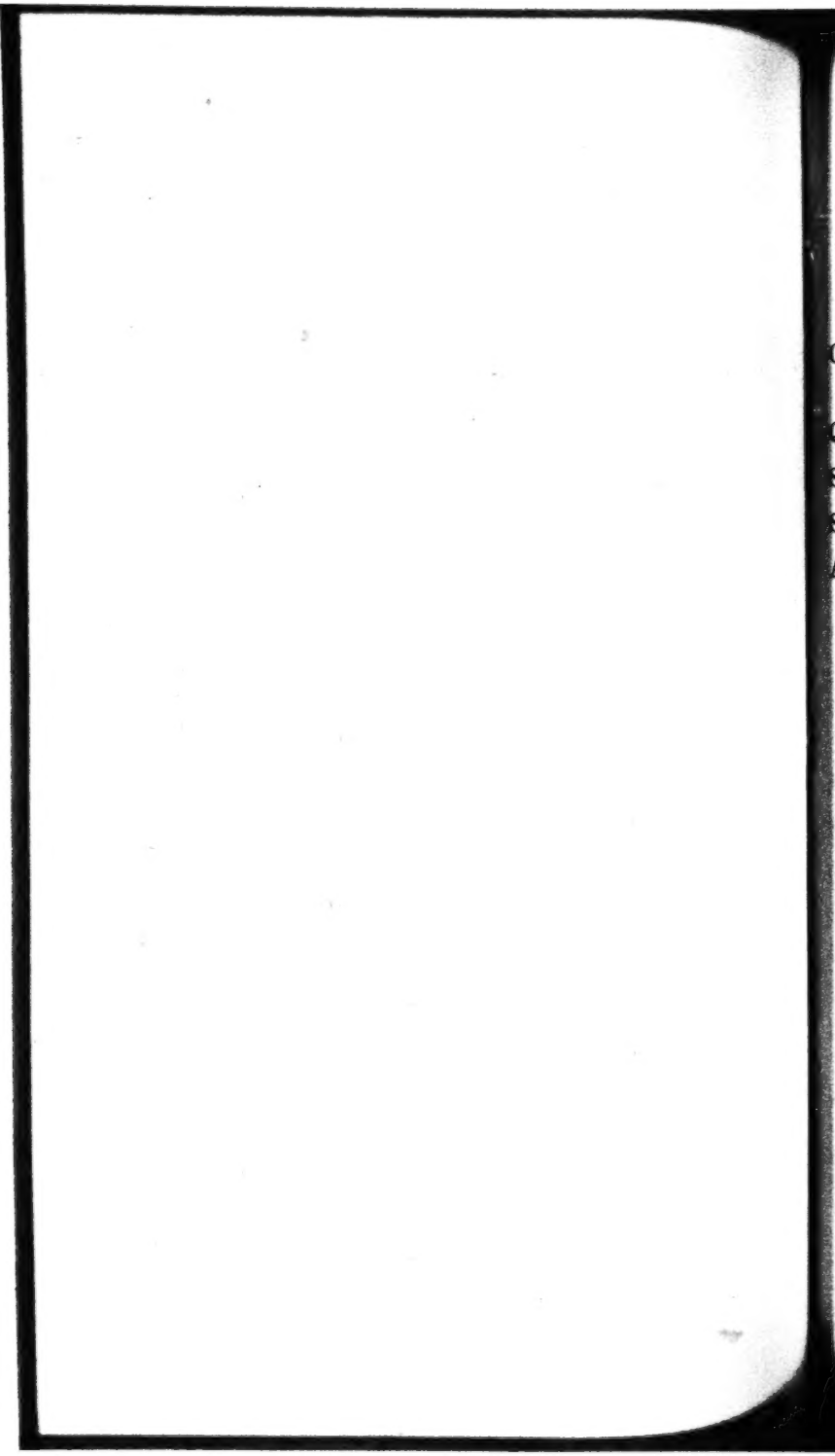

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